

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In Re: Bair Hugger Forced Air Warming Devices Products Liability Litigation) File No. 15-MD-2666
) (JNE/DTS)
)) August 16, 2018
)) Minneapolis, Minnesota
)) Courtroom 12W
)) 9:50 a.m.
))
))

BEFORE THE HONORABLE JOAN N. ERICKSEN
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE DAVID T. SCHULTZ
UNITED STATES MAGISTRATE JUDGE

(STATUS CONFERENCE)

APPEARANCES

FOR THE PLAINTIFFS:

MESHBESHER & SPENCE LTD.
Genevieve M. Zimmerman
1616 Park Avenue
Minneapolis, MN 55404

PRITZKER HAGEMAN
David Szerlag
45 South Seventh Street
Plaza Seven Building, Ste. 2950
Minneapolis, MN 55402

CIRESI CONLIN LLP
Michael A. Sacchet
225 South Sixth Street
Suite 4600
Minneapolis, MN 55402

KENNEDY HODGES LLP
David W. Hodges
711 West Alabama Street
Houston, TX 77006

1 FOR THE PLAINTIFFS (contd): GOLDENBERG LAW PLLC
2 Noah Lauricella
3 800 LaSalle Avenue
Suite 2150
Minneapolis, MN 55402

4 JOHNSTON BECKER, PLLC
Lisa Ann Gorshe
5 444 Cedar Street
Suite 1800
6 St. Paul, MN 55101

7 FOR THE PLAINTIFFS APPEARING BY PHONE:

8 LEVIN PAPANTONIO
Daniel A. Nigh
9 316 S. Baylen Street
Suite 600
Pensacola, FL 32502

11 MESHBESHER & SPENCE
Holly Sternquist
12 1616 Park Avenue
Minneapolis, MN 55404

13 PETERSON & ASSOCIATES, P.C.
Brian Emerson Tadtman
14 801 W. 47th Street, Suite 107
Kansas City, MO 64112

16 BERNSTEIN LIEBHARD LLP
Dae Y. Lee
17 10 East 40th Street
New York, NY 10016

19 THE OLINDE FIRM, LLC
Alfred Olinde
Wesley G. Barr
20 400 Poydras Street
Suite 1980
New Orleans, LA 70130

22 MORGAN & MORGAN, PA
Heather Cullen
Michael S. Goetz
Joseph T. Waechter
24 201 N. Franklin St 7th Floor
Tampa, FL 33602

1 FOR THE PLAINTIFFS APPEARING BY PHONE (contd):

2 RAIZNER SLANIA, LLP
3 Jeffery L. Raizner
4 Rica Rinosa
5 Amy Hargis
6 Erin Stracerner
7 Kristen Gorombol
8 2402 Dunlavy Street
9 Houston, TX 77006

10 LONCAR & ASSOCIATES
11 William Hymes
12 John L. Coveney
13 424 S. Cesar Chavez Blvd
14 Dallas, TX 75201

15 CAPRETZ & ASSOCIATES
16 Don K. Ledgard
17 James T. Capretz
18 Patrick B. Martinez
19 5000 Birch St, Suite 2500
20 Newport Beach, CA 92660

21 HOUSSIERE DURANT & HOUSSIERE
22 Randall A. Kauffman
23 Monica Vaughan
24 Tomeca H. Fenner
25 Shirley Strom-Blanchard
1990 Post Oak Blvd Suite 800
Houston, TX 77056

DAVIS & CRUMP, PC
Robert Cain, Jr.
Wes Stevenson
2601 Fourteenth Street
Gulfport, MS 39507

SKIKOS CRAWFORD SKIKOS &
JOSEPH, LLP
Matt Skikos
Darilyn Simon
Julie Tucci
One Sansome Street, Suite 2830
San Francisco, CA 94104

1 FOR THE PLAINTIFFS APPEARING BY PHONE (contd):

2 THE RUTH TEAM
3 Austin J. Grinder
4 Steven C. Ruth
5 8600 4th St North
6 Saint Petersburg, FL 33702

7 LAW OFFICE OF TRAVIS R. WALKER
8 Travis R. Walker
9 Julie Treacy
10 Valerie Marshall
11 1235 SE Indian Street
12 Suite 101
13 Stuart, FL 34997

14 ANDREWS & THORNTON
15 Anne Andrews
16 Lauren Davis
17 Marco Galindez
18 Bradley East
19 Anthony Scotto
20 2 Corporate Park, Suite 110
21 Irvine, CA 92606

22 MURRAY LAW FIRM
23 Caroline Whitney Thomas
24 650 Poydras Street
25 Suite 2150
New Orleans, LA 70130

26 BROWN & CROUPPEN, PC
27 Abby Cordray
28 Seth S. Webb
29 Vanessa Mixco
30 211 North Broadway
31 Suite 1600
32 St. Louis, MO 63102

33 BEASLEY ALLEN
34 Matthew Munson
35 Renee Lindsey
36 218 Commerce Street
Montgomery, AL 36104

37 FITZGERALD LAW GROUP, LLC
38 Kevin Fitzgerald
39 120 Exchange Street
40 Suite 200
Portland, ME 04101

1 FOR THE PLAINTIFFS APPEARING BY PHONE (contd):

2 PARKER WAICHMAN, LLP
3 Michael S. Werner
4 Nicole Eisner
5 Giselle Grant
6 59 Maiden Lane
7 6th Floor
8 New York, NY 10038

9 RANDALL J. TROST, P.C.
10 Carrie Hancock
11 Pam Rodriguez
12 Randall T. Trost
13 801 Main Street
14 Lynchburg, VA 24504

15 THE MILLER FIRM, LLC
16 Tayjes M. Shah
17 The Sherman Building
18 108 Railroad Avenue
19 Orange, VA 22960

20 LANGDON & EMISON
21 Lauren Niendick
22 Rachel Ahmann (Assistant)
23 911 Main Street
24 Lexington, MO 64067

25 LEWIS & CAPLAN
Pet Lewis
Sarah Delahoussaye Call
Amy C. Webster
3631 Canal Street
New Orleans, LA 70119

LEWIS & CAPLAN
Pet Lewis
Sarah Delahoussaye Call
Amy C. Webster
3631 Canal Street
New Orleans, LA 70119

THE WEBSTER LAW FIRM
Chelsie Garza
Jason C. Webster
6200 Savoy Suite 150
Houston, TX 77036

GOZA & HONNOLD, LLC
Lisa R. Joyce
11181 Overbrook Road
Suite 200
Leawood, KS 66211

1 FOR THE PLAINTIFFS APPEARING BY PHONE (contd):

2 MARTIN HARDING & MAZZOTI, LLP
3 Rosemarie Bogdan
4 Kristen Winner
5 1222 Troy-Schenectady Road
6 P.O. Box 15141
7 Albany, NY 12212-5141

8 SHOWARD LAW FIRM PC
9 Elizabeth Whitley
10 Sarah J. Showard
11 4703 E Camp Lowell Drive
12 Suite 253
13 Tucson, AZ 85712

14 BACHUS & SCHANKER, LLC
15 Alexandra Franklin
16 Darin Schanker
17 J. Kyle Bachus
18 J. Christopher Elliott
19 1899 Wynkoop Street, Suite 700
20 Denver, CO 80202

21 CHAPPELL SMITH & ARDEN, P.A.
22 Graham L. Newman
23 Mark D. Chappell, Jr.
24 15150 Calhoun Street
25 Columbia, South Carolina 29201

26 PRITZKER HAGEMAN, P.A.
27 Wendy Thayer
28 45 South Seventh Street
29 Plaza Seven Building, Ste. 2950
30 Minneapolis, MN 55402

31 THE AHEARNE LAW FIRM, PLLC
32 Allan J. Ahearne
33 Jessica J. Pauley
34 Abigail M. Spurney
35 24 Main Street
36 Warwick, NY 10990

37 THE WHITEHEAD LAW FIRM, LLC
38 C. Mark Whitehead III
39 Anna Katherine Higgins
40 Eric J. Mausner
41 Petroleum Tower, Suite 303
42 3639 Ambassador Caffery Pkwy
43 Lafayette, LA 70503

1 FOR THE PLAINTIFFS APPEARING BY PHONE (contd):

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
THE REARDON LAW FIRM, PC
John Nazzaro
Casandra Haggett
160 Hempstead Street
New London, CT 06320

LOCKRIDGE GRINDAL NAUEN PLLP
Elizabeth A. Peterson
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401-2159

BERNHAIM DOLINSKY KELLY
Paula S. Bliss
Christina Shuman
4 Court Street
Plymouth, MA 02360

BRENT COON & ASSOCIATES
James A. Morris, Jr.
Matthew R. Willis
Wendy Wafford
4111 West Alameda Avenue
Suite 611
Burbank, CA 91505

CARR & CARR ATTORNEYS
Patrick E. Carr
Michael Carr
Jack Beesley
Laurie Koller
Susan Hunter
4416 South Harvard Avenue
Tulsa, OK 74135

HARE WYNN NEWELL & NEWTON
Donald P. McKenna
Lynne Reed
Peggy Little
2025 Third Avenue North
Suite 800
Birmingham, AL 35203

KIRTLAND & PACKARD
Behram V. Parekh
2041 Rosecreans Avenue, Ste 300
El Segundo, CA 90245

1 FOR THE PLAINTIFFS APPEARING BY PHONE (contd):

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

LAW OFFICE OF CHARLES H JOHNSON
Charles H. Johnson
2599 Mississippi Street
New Brighton, MN 55112

MCEWEN LAW FIRM LTD
Gregory N. McEwen
Emily Robinson
Tania Krager
5850 Blackshire Path
Inver Grove Heights, MN 55076

MEYERKORD & MEYERKORD, LLC
Joseph D. Klenofsky
1717 Park Avenue
St. Louis, MO 63104

NAPOLI BERN RIPKA SHKOLNIK LLP
Nicholas R. Farnolo
360 Lexington Avenue
11th Floor
New York, NY 10017

LAW OFFICE OF NEAL R. ELLIOTT
Neal R. Elliott, Jr.
P.O. Box 80136
Baton Rouge, LA 70898

NEWMAN BRONSON & WALLIS
Lauren E. Bronson
2300 West Port Plaza Drive
St. Louis, MO 63146

POGUST BRASLOW & MILLROOD, LLC
Jessica Lowe
Eight Tower Bridge, Suite 940
161 Washington Street
Conshohocken, PA 19428

RICHARDSON, PATRICK, WESTBROOK
& BRICKMAN, LLC
Daniel S. Haltiwanger
Missi Cruz
1730 Jackson Street
P.O. Box 1368
Barnwell, SC 29812

1 FOR THE PLAINTIFFS APPEARING BY PHONE (contd):

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
SANDERS PHILLIPS GROSSMAN
Randi A. Kassan
Michael Nathan
100 Garden City Plaza
Suite 500
Garden City, NY 11530

SCHLICHTER BOGARD & DENTON, LLP
Kristine K. Kraft
Hillary Grupe
Sierra Koelker
100 South Fourth Street
Suite 1200
St. Louis, Missouri 63102

FOR THE DEFENDANTS:

BLACKWELL BURKE P.A.
Jerry W. Blackwell
Ben Hulse
Mary Young
Corey Gordon
431 South Seventh Street
Suite 2500
Minneapolis, MN 55415

MITCHELL WILLIAMS
Lyn Pruitt
425 West Capitol Avenue
Suite 1800
Little Rock, AR 72201

COURT REPORTER:

Renee A. Rogge, RMR-CRR
U.S. Courthouse
300 South Fourth Street
Suite 1005
Minneapolis, MN 55415

Proceedings recorded by mechanical stenography;
transcript produced by computer.

1 P R O C E E D I N G S

2 (9:50 a.m.)

3 THE COURT: Good morning, everybody. Welcome
4 back. Please be seated.

5 Do you know if the phone has been -- phone people
6 on mute. Thank you. I'm just going to check now to make
7 sure that the --

8 All right. People on the phone, can you hear us
9 all right?

10 UNIDENTIFIED MALE SPEAKER: Yes, Your Honor.

11 UNIDENTIFIED MALE SPEAKER: Yes, Your Honor.

12 THE COURT: Okay. All right. I'm going to put
13 you back on mute, but I wanted to say good morning and make
14 sure that you were all there.

15 UNIDENTIFIED MALE SPEAKER: Good morning, Your
16 Honor.

17 UNIDENTIFIED MALE SPEAKER: Good morning, Your
18 Honor.

19 THE COURT: Okay. You are on mute now, so if you
20 are saying "good morning," it's wasted energy.

21 We have Judge Schultz here. Has he been on the
22 bench for any of these since you have --

23 MR. BLACKWELL: The last one, Your Honor.

24 THE COURT: The last one? Okay. I remember it as
25 if it was yesterday. Don't ask me what happened yesterday,

1 right?

2 All right. Well, let's have identifications from
3 first the plaintiffs. Ms. Zimmerman, you want to start?

4 MS. ZIMMERMAN: Good morning, Your Honor.

5 Genevieve Zimmerman for plaintiffs.

6 MR. SZERLAG: David Szerlag for plaintiffs.

7 MR. SACCHET: Good morning. Michael Sacchet for
8 plaintiffs.

9 MR. HODGES: David Hodges for plaintiffs.

10 THE COURT: And who have we got in the back? I
11 have got people on my list here. Noah somebody and Lisa
12 somebody.

13 MR. LAURICELLA: Good morning, Your Honor. Noah
14 Lauricella.

15 MS. GORSHE: Lisa Gorshe.

16 THE COURT: And you are attorneys representing
17 plaintiffs?

18 MS. GORSHE: Plaintiffs.

19 MR. LAURICELLA: Yes, Your Honor.

20 THE COURT: And they are behind the bar.

21 Mr. Blackwell.

22 MR. BLACKWELL: Good morning, Your Honor. Jerry
23 Blackwell speaking for 3M.

24 MS. PRUITT: Lyn Pruitt for 3M.

25 MS. YOUNG: Good morning. Mary Young also for 3M.

1 MR. HULSE: And Ben Hulse for 3M. Good morning.

2 THE COURT: Good morning. And you have got,
3 sitting behind the bar, you have got --

4 MR. BLACKWELL: Corey Gordon, Your Honor.

5 MS. SCHAFER: Haley Schaffer, Your Honor, counsel
6 for 3M.

7 THE COURT: I didn't hear that, but --

8 I would like to -- let's take a look at the joint
9 agenda and find something noncontroversial to start with,
10 shall we? Let's take the overview of the Canadian action.

11 Ms. Zimmerman.

12 MS. ZIMMERMAN: Yes, Your Honor.

13 Your Honor, I don't think that I have much to add
14 actually on the overview of the Canadian action. To my
15 knowledge, there has not been additional progress in that
16 litigation and I believe that we're in agreement with that,
17 so I think that that has been just kind of sitting there for
18 a while.

19 I do think that we were able to resolve the
20 question -- we had, I guess, a bit of a dispute at the last
21 hearing about how many cases might be pending. We had
22 different numbers. And I think that we are in agreement
23 now. It's just over 4,800 cases that are pending.

24 THE COURT: I have got 4,809 on the status
25 conference, so --

1 MS. ZIMMERMAN: That's right about there. And I
2 think that the discrepancy last time was that we had not
3 backed out from that number those cases that had been
4 dismissed for one reason or another.

5 THE COURT: Okay.

6 MR. SZERLAG: Your Honor, if I may. The count as
7 of yesterday was 4,848, I believe, pending in the MDL.

8 THE COURT: Thank you.

9 MR. SZERLAG: 24. 4,824.

10 THE COURT: It's really important, though, we get
11 that number exactly, so thank you.

12 MR. SZERLAG: My able assistant Wendy assures me
13 that that is an accurate count.

14 THE COURT: Thank you, Wendy, wherever you are.

15 Mr. Szerlag, do you want to report on the related
16 state court proceedings as well?

17 MR. SZERLAG: Good morning again, Your Honor.

18 I don't believe there's anything other than what's
19 in the joint report. We have not had anything else to
20 really add to what is going on in the pending actions.

21 THE COURT: The *Bythwood*, the case in Jefferson
22 County, Alabama, I thought when I read through this that it
23 looked like something was happening there.

24 MR. SZERLAG: Okay.

25 THE COURT: Or not really. It's just that

1 October 11, 2018, is the -- what is that? The discovery
2 deadline that was set way back?

3 MR. SZERLAG: I believe so.

4 I try to reach out to counsel every month before
5 the status conference as well and, quite honestly, it's kind
6 of like a crap shoot whether anybody ever gets back to you
7 on this, so --

8 THE COURT: Well, whether anybody gets back to
9 you.

10 MR. SZERLAG: Right.

11 THE COURT: Once you become a judge, people have
12 to get back to you.

13 MR. SZERLAG: That's the nice thing.

14 THE COURT: Just because they want to, I am sure.

15 Okay. So I think that's it, right, on the related
16 cases?

17 MR. SZERLAG: Yes.

18 THE COURT: Okay. Thank you very much for your
19 report.

20 Let's talk about the status of the discovery in
21 the Axline case. Ms. Zimmerman, I have got here that the
22 primary care physician's deposition was taken. We know
23 that.

24 MS. ZIMMERMAN: That's correct. Sarah Wynn is a
25 physician's assistant. She's not technically a doctor, but

1 that was done on June 26th.

2 THE COURT: And then Dr. Smith, the infectious
3 disease doctor, of course.

4 MS. ZIMMERMAN: Correct.

5 THE COURT: And the plaintiff herself and her
6 spouse have been deposed?

7 MS. ZIMMERMAN: That's correct. Yes.

8 THE COURT: The anesthesiologist, Dr. Narcelles --

9 MS. ZIMMERMAN: That's correct.

10 THE COURT: -- was deposed. And the orthopedic
11 surgeon was again, as we know, deposed on August 1st.

12 MS. ZIMMERMAN: Correct.

13 THE COURT: Okay.

14 MS. ZIMMERMAN: In addition to that, and I think
15 that this appears on the next page --

16 THE COURT: The operating room inspection?

17 MS. ZIMMERMAN: That did go forward.

18 THE COURT: Okay.

19 MS. ZIMMERMAN: And in addition to that, the
20 plaintiffs have in fact served expert reports in that case
21 as well.

22 THE COURT: Okay. Any issues in the inspection --

23 MS. ZIMMERMAN: No.

24 THE COURT: -- of the operating room?

25 MS. ZIMMERMAN: No.

1 THE COURT: So we're down -- are we just down to
2 one case in the second bellwether pool?

3 MS. ZIMMERMAN: That's correct, Your Honor.

4 THE COURT: So what does this mean, "Case-specific
5 written discovery has been served and answered in the other
6 six cases"?

7 MS. ZIMMERMAN: So in the final pool of eight
8 cases there were two cases that were mutually nominated by
9 both defendants and plaintiffs. That was the *Axline* and the
10 *Hives* matter. *Hives* has been dismissed. There were six
11 other cases.

12 THE COURT: Okay.

13 MS. ZIMMERMAN: And so there has been
14 case-specific discovery done there, but we have not done
15 hospital inspections or any kind of depositions or expert
16 reports. That's not part of a scheduling order just yet,
17 and so that just hasn't proceeded at this point.

18 THE COURT: Okay. And then in Other Motions,
19 there's the new trial motion, and we have got the reply or
20 the answer. And then no reply to that, right?

21 MS. ZIMMERMAN: We opted not to reply and just
22 leave it on the briefs. And I don't know if the court
23 expects to be setting that for hearing and taking oral
24 argument, but obviously we defer to the court's preference
25 in that regard.

1 THE COURT: And then so that motion is fully
2 briefed?

3 MS. ZIMMERMAN: Fully briefed.

4 THE COURT: And then there's a motion for judgment
5 on the pleadings that I think is not fully briefed; is that
6 correct?

7 MS. ZIMMERMAN: Yes, Your Honor. I believe our
8 response is due maybe next Friday. Defendants noted in the
9 agenda, as I am sure Your Honor is aware, that they would be
10 willing to shorten their time for reply, if the court would
11 like to hear the motion earlier. It is presently scheduled
12 for hearing at the status conference in September.

13 THE COURT: What would -- what's their normal -- I
14 mean, it's a pretty short time anyway to reply.

15 MS. ZIMMERMAN: I think it's seven days.

16 MR. HULSE: Two weeks.

17 MS. ZIMMERMAN: Is it two weeks?

18 THE COURT: Is it two weeks for a reply?

19 MR. HULSE: Yeah. So our thought was it would be
20 helpful to get a ruling on this before we have our summary
21 judgment deadline, which is on October 8th, because if
22 granted this would clear out most of the claims, perhaps all
23 of the claims in the case. So our thought would be to
24 increase the possibility of a resolution for that deadline
25 to shorten our reply to seven days, if that would be able to

1 get us a hearing earlier than the September 20th status
2 conference.

3 THE COURT: I would be happy to have your reply in
4 seven days instead of fourteen days. I can't guarantee a
5 hearing date before that, but I would rather have it in
6 seven than fourteen. And so if you could get it in seven,
7 that would be great.

8 MR. HULSE: We will do that, Your Honor. And I
9 would add from our perspective it's nonvital to have oral
10 argument on this motion, but, of course, plaintiffs have the
11 right to it if they want it.

12 THE COURT: Do they have a right to it?

13 MR. HULSE: Well, I shouldn't have said that.
14 They don't have the right, but they have the right to ask --

15 THE COURT: You should practice in another
16 district some day.

17 MR. HULSE: I admit they have the right to ask for
18 it if they want it.

19 THE COURT: Why don't you sit down now?

20 MR. HULSE: I will, Your Honor.

21 THE COURT: All right. You are done.

22 MS. ZIMMERMAN: And, of course, one of the
23 benefits of practicing here in the District of Minnesota is
24 that we typically are afforded the right or the opportunity,
25 and we would like to present oral argument if Your Honor

1 would hear us.

2 THE COURT: They might be in front of you before
3 then too, aren't they?

4 MAGISTRATE JUDGE SCHULTZ: I believe they will be.

5 THE COURT: All right. Well, shall we turn our
6 attention to the pretrial orders or --

7 Ms. Pruitt, hello. You look like you want to
8 say --

9 MS. PRUITT: I did, Your Honor. Something on the
10 status of discovery I think needs to be reported to the
11 court.

12 THE COURT: I would love to hear it.

13 MS. PRUITT: As the court may or may not be aware,
14 we extended the time for expert reports to be submitted in
15 the Axline case, which is the case scheduled for trial on
16 the 3rd of December. We extended it just a few days. We
17 got the expert reports from the plaintiff on Monday
18 the 13th. And as the court recalls, there was a cutoff for
19 expert reports that concern generic issues and generic
20 opinions that's long since past. It was actually probably
21 over a year ago.

22 The plaintiffs submitted three expert reports, one
23 of which we have no dispute about, a case-specific report
24 from Dr. Jarvis about the cause of Ms. Axline's infection,
25 but there were two other expert reports that were submitted,

1 one was a supplemental report from Dr. David. And Your
2 Honor remembers Dr. David who testified in the Gareis trial.
3 He testified about, as the court remembers, alternative
4 designs. They have now submitted what we consider to be an
5 improper supplemental report by David. It includes
6 discussion of seven new alternative designs.

7 As the court recalls, there were orders entered by
8 Judge Noel on not allowing discovery on certain alternative
9 designs because a determination had been made that, for
10 instance, conductive warming was not an alternative design,
11 a feasible alternative design, so we didn't conduct any
12 discovery on that. He, David, has now listed seven new
13 alternative designs, and no discovery has been conducted on
14 any of those.

15 Secondly, with regard to David's report, the
16 information that he is including in this report has been
17 available, Your Honor, from the very beginning. From the
18 time that he issued his original report, these alleged
19 alternative designs were out there. The data or the studies
20 or the articles he cites as to his reliance are things that
21 were in -- that were available and out there when he
22 submitted his first report.

23 And, most importantly, with regard to Dr. David,
24 his report is on generic issues. It is not specific to
25 Mrs. Axline. And I think everybody understood that we had

1 one deadline for generic reports and another deadline for
2 case-specific reports. The deadline for case-specific
3 reports was August the 10th. We extended it to August
4 the 13th. And they submitted these three reports. David is
5 not a case-specific Axline report. So we have issues with
6 that report.

7 The second report that we are concerned about is
8 by a gentleman named Nathan Bushnell. Again, Nathan
9 Bushnell's report is the first time we have seen a report
10 from Nathan Bushnell. It is not a case-specific report that
11 applies to Mrs. Axline. It is a generic report. It is also
12 what we consider to be, Your Honor, improper surrebuttal.
13 It is submitted specifically for the purpose of refuting or
14 counter-acting Dr. Abraham's testimony. As you recall,
15 judge, Dr. Abraham testified in the Gareis trial. It is
16 simply submitted to rebut Dr. Abraham's opinion. And as the
17 court recalls, there have been repeated denials in this
18 litigation of plaintiffs' request to submit surrebuttal
19 expert reports. And in our view this is simply an end run
20 to try to get around the previous rulings of the court and
21 submit an improper surrebuttal report that has absolutely
22 nothing to do with Ms. Axline.

23 So, in summary, both of these reports are generic,
24 they have been submitted pursuant to a case-specific report
25 deadline, they are too late, and we're extremely prejudiced

1 to have an expert come in and list seven new alternative
2 designs when no discovery has ever been done on those. It
3 is also improper to try to go around the court's orders on
4 surrebuttal expert reports and now submit this report from
5 Nathan Bushnell. But the biggest point is these are generic
6 opinions, they do not apply to Mrs. Axline, and the deadline
7 has long since past. So we are concerned about that, and we
8 wanted to raise the issue with the court so it would come as
9 no surprise.

10 THE COURT: Do you have copies of the reports of
11 Dr. David and Nathan Bushnell?

12 MS. PRUITT: Yes.

13 THE COURT: Ms. Zimmerman, any objection to the
14 court receiving the copies of those at this point? We are
15 not ready to hear argument, obviously. We don't have
16 anything. But I know we are going to be required to read
17 it, so we might as well get it now rather than later,
18 because you may have heard that the district is highly
19 overworked at the moment, so --

20 MS. ZIMMERMAN: We don't have an objection to the
21 court receiving copies of the orders at this time.

22 THE COURT: Okay.

23 MS. ZIMMERMAN: We certainly think that to the
24 extent that the defendants are intending to bring a motion
25 to strike that we would request the opportunity to fully

1 brief those issues.

2 With respect to just kind of previewing issues,
3 given that Ms. Pruitt did that, David's report did not
4 include conductive warming reports on reasonable alternative
5 design in the general causation stage primarily because the
6 court had previously declined, refused to allow us to do
7 discovery on VitaHEAT on the idea or finding that that was
8 in fact not a reasonable alternative design. That decision
9 was changed with respect to the Gareis case.

10 And so in an abundance of caution and given the
11 law in Ohio, which has a broader standard for a reasonable
12 alternative design, Dr. David has supplemented his general
13 causation report to make clear that things like not warming,
14 things like pre-warming, things like warming with cotton
15 blankets are all appropriate alternatives available to
16 surgeons.

17 THE COURT: All right. So we will take the
18 reports either now, if you have them, or as soon as you can
19 get us copies, and then we will be on the lookout for a
20 motion and an explanation.

21 MS. ZIMMERMAN: And just so we are aware, is this
22 going to be a motion to strike the expert reports or --

23 MS. PRUITT: We are considering what the proper
24 motion is.

25 MS. ZIMMERMAN: All right. And with respect to

1 Nathan Bushnell's report, this is -- it's a rebuttal report
2 to Dr. Abraham's general causation report. As the court is
3 aware, the plaintiffs have moved to exclude Dr. Abraham
4 under Daubert. We have renewed that motion in our motion
5 for new trial. And we continue to believe that Dr. Abraham
6 should not have been permitted to testify. Dr. Nathan
7 Bushnell's report is simply to outline the errors and the
8 inaccuracies in methodology in Dr. Abraham's report.

9 THE COURT: So you don't want Bushnell in *Axline*?
10 You are offering Bushnell as part of the motion for a new
11 trial?

12 MS. ZIMMERMAN: No, Your Honor. I am sorry if I
13 misspoke. We do intend to bring Dr. Bushnell as part of
14 plaintiffs' rebuttal case, should defendants intend to bring
15 Dr. Abraham again.

16 THE COURT: Okay. All right. Thank you.

17 MR. BLACKWELL: Your Honor.

18 THE COURT: Hello, Mr. Blackwell.

19 MR. BLACKWELL: There is one other *Axline* issue I
20 wanted to raise and ask a question about, if I may.

21 THE COURT: Go ahead.

22 MR. BLACKWELL: And, Your Honor, this may be more
23 aptly addressed to Judge Schultz.

24 We had written a letter about an issue that arose
25 in the deposition of the orthopedic surgeon Dr. Lombardi

1 that was a fairly significant issue. It is a discovery
2 issue. And whether it's the preference of Your Honors,
3 Judge Schultz, that we set it and have it heard with Judge
4 Schultz or raise it now, we obviously defer, but we didn't
5 want to sort of pass by the discussion of Axline discovery
6 issues and not raise it.

7 THE COURT: Okay. And then there was a response
8 also from the plaintiffs?

9 MR. BLACKWELL: Yes, from the plaintiffs.

10 THE COURT: Yeah. And I think we both read those.

11 MAGISTRATE JUDGE SCHULTZ: Yes.

12 THE COURT: Yeah, you will be in front of the
13 magistrate judge.

14 MR. BLACKWELL: All right. Thank you, Your Honor.

15 THE COURT: Thank you.

16 MS. ZIMMERMAN: Your Honor, there were two
17 additional things that I think we didn't add that are
18 pending motions before the court. And because we, I think,
19 neglected to include them on the joint status report, I did
20 just want to remind the court there are pending motions with
21 respect to defendants' motion on the bill of costs in Gareis
22 and then there are also pending motions, joint motions,
23 regarding sealing of certain documents that happened during
24 trial. And because they weren't in the joint agenda, I just
25 wanted to point those out.

1 THE COURT: Okay. Thank you.

2 Is there agreement, turning to the pretrial
3 orders, is there agreement on any of the cases? I thought
4 there was agreement on -- I'll put these aside for the
5 moment. I have that the motion to dismiss has been
6 withdrawn on -- and I am ready to read the list of cases.

7 Mr. Hulse, do you want to follow along and make
8 sure I get these right?

9 MR. HULSE: I will. This is the plaintiff fact
10 sheets?

11 THE COURT: Yeah. I think we are to that, aren't
12 we?

13 MR. HULSE: Yes, of course, Your Honor.

14 THE COURT: I mean, is there something else? I
15 ran out of noncontroversial things to talk about. So now I
16 am on the plaintiff fact sheets, and now I am looking for
17 noncontroversial things there.

18 MR. HULSE: Yeah, we have got that. We have got
19 the motion for order to show cause on the no product ID
20 cases, and then we also have --

21 THE COURT: And I am calling those PFS issues.

22 MR. HULSE: Fair enough, Your Honor.

23 THE COURT: As just a preview of how I might react
24 to your motion. I'm probably not going to grant your
25 motion.

1 MR. HULSE: Okay, Your Honor.

2 THE COURT: But we can discuss it.

3 But, at any rate, on the PTO 14, you have
4 withdrawn on -- ready?

5 MR. HULSE: Yes.

6 THE COURT: *Zimmerman*, which is 17-2925, correct?

7 MR. HULSE: I'm going to grab a list that's
8 ordered. I think the court has ordered it. Sorry for the
9 delay.

10 THE COURT: No. That's okay.

11 MR. HULSE: Yes, Your Honor.

12 THE COURT: Yes. Okay. So that one. And then
13 *Gorbett*, which is -- these are all 17 unless I say. We've
14 got some 18s coming up.

15 MR. HULSE: Right.

16 THE COURT: But *Gorbett* is 3252?

17 MR. HULSE: Yes, Your Honor.

18 THE COURT: *Cyr*, 3554?

19 MR. HULSE: Yes, Your Honor.

20 THE COURT: *Parker*, 3573?

21 MR. HULSE: Correct.

22 THE COURT: *Pratt*, 3952?

23 MR. HULSE: Yes, Your Honor.

24 THE COURT: *Rude*, 4009?

25 MR. HULSE: Yes, Your Honor.

1 THE COURT: *Robertson*, 4327? There are two
2 Robertsons. One is 4327 and one is 4328.

3 MR. HULSE: Yes, Your Honor.

4 THE COURT: On both of them?

5 MR. HULSE: 4327 I have.

6 THE COURT: Okay. How about 4328?

7 MR. HULSE: I don't believe so, but if we can come
8 back to that I will double check.

9 THE COURT: Okay.

10 MR. HULSE: Yes, Your Honor, 4328.

11 THE COURT: Okay. That is. All right. See, I
12 got out my pencil and I knew it was for good reason, because
13 I can erase, not a pen. Okay. That's 4328.

14 Then *Ingram*, 4470?

15 MR. HULSE: Yes, Your Honor.

16 THE COURT: *Henderson*, 4517?

17 MR. HULSE: Correct.

18 THE COURT: *Hyer*, 4752?

19 MR. HULSE: Yes, Your Honor.

20 THE COURT: *Murray*, 4845?

21 MR. HULSE: Yes, Your Honor.

22 THE COURT: *Thornton*, 4889?

23 MR. HULSE: Correct.

24 THE COURT: *Edwards*, 4891?

25 MR. HULSE: Correct.

1 THE COURT: *Johnston*, 5270?

2 MR. HULSE: Correct.

3 THE COURT: *Billings*, 5277?

4 MR. HULSE: Correct.

5 THE COURT: *Jones*, 5472?

6 MR. HULSE: Correct.

7 THE COURT: And then *McCullough*, which is an 18.

8 We are now in the 18s. 437?

9 MR. HULSE: Correct.

10 THE COURT: *Garrison*, 444?

11 MR. HULSE: Correct.

12 THE COURT: *Morgan*, 527?

13 MR. HULSE: Correct.

14 THE COURT: *Larrison*, 609?

15 MR. HULSE: Yes, Your Honor.

16 THE COURT: *Hayes*, 617?

17 MR. HULSE: Yes, Your Honor.

18 THE COURT: I have a couple of plaintiffs who have
19 stipulated to dismissal. Ms. Zimmerman, I have got *Smith*,
20 17-3501.

21 MS. ZIMMERMAN: Yes, Your Honor.

22 THE COURT: And *Coggins*, which is 17-4257.

23 MS. ZIMMERMAN: That's correct, Your Honor.

24 THE COURT: Anybody missed here?

25 MR. HULSE: Your Honor, I just want to make sure,

1 and maybe you did this at the beginning, that you got
2 Zimmerman, 17-2925. That was at the beginning?

3 THE COURT: Yes. Yes, 2925, 17-2925.

4 MR. HULSE: Thank you. Yes, then we are on the
5 same page.

6 THE COURT: Okay. There are one, two, three,
7 four, five, six, seven, eight, nine, ten, eleven, twelve,
8 thirteen -- then there are thirteen PFS 14 plaintiffs who
9 have filed responses and six plaintiffs who have filed no
10 response?

11 MR. HULSE: That sounds accurate, Your Honor.

12 THE COURT: Okay. Let me unmute the phone. Well,
13 first, I will unmute the phones now.

14 Ms. Zimmerman, with respect to *Erdman*, which is
15 17-CV-4385, *Greene*, which is 17-4433, *Keith*, 17-4654,
16 *Resendez*, 17-4677, *Robinson-Bessicks*, 17-5123, and *Rhew*,
17 18-cv-641, my records show no response.

18 MS. ZIMMERMAN: My records are in accord with Your
19 Honor's.

20 THE COURT: Okay. And so now this question is for
21 counsel who are on the phone.

22 Anybody represent any of those plaintiffs and have
23 anything -- has there been any response, because we
24 don't have one.

25 MR. MORRIS: Your Honor, this is James Morris. I

1 am on the *Rhew* case. That's R-h-e-w. And we have
2 diligently attempted to contact the plaintiff, and we have
3 not received any response. So our answer to you is in the
4 affirmative; we have not received a response.

5 THE COURT: Okay. Thank you. Thank you very
6 much.

7 Anybody else?

8 MR. NIGH: Your Honor, this is Daniel Nigh,
9 attorney at Levin Papantonio. I represent James Greene.
10 Despite multiple contacts to try to get a PFS back, we
11 actually -- the last time we finally got in contact with him
12 recently he advised that he no longer wants to pursue it.

13 THE COURT: Okay. Thank you very much. And let
14 me just ask the court reporter if she got your name.

15 (Discussion with court reporter.)

16 THE COURT: She's asking that you repeat your
17 name. That's counsel for Mr. Greene.

18 MR. NIGH: It's Daniel Nigh, N-i-g-h, and it's
19 Levin Papantonio.

20 THE COURT: Thank you so much.

21 MS. ZIMMERMAN: I can help with contact
22 information.

23 THE COURT: All right. Thank you, Ms. Zimmerman.
24 Anybody else?

25 MR. WALKER: Your Honor, Travis Walker, Law Office

1 of Travis Walker. You had referenced two Robinsons or one
2 *Robinson*, and I was looking for clarification as to which,
3 if either, were on the list.

4 THE COURT: *Robinson-Bessicks* and that is
5 17-cv-5123.

6 MR. WALKER: Okay. So there is only one, Your
7 Honor?

8 THE COURT: Please repeat.

9 MR. WALKER: I apologize, Your Honor. It was
10 just -- I thought I heard two Robinsons, but there is only
11 one *Robinson* on the list now?

12 THE COURT: There is only one *Robinson* on that
13 list. There is a *Robinson* -- there's a *Robertson*. There
14 were two *Robertsons* on the other list where the defendants
15 are withdrawing their motion. That's 17-4327 and 17-4328.
16 But there was a *Robinson*, if I -- so are you *Robinson*
17 18-cv-263, by any chance?

18 MR. WALKER: Yes, Your Honor.

19 THE COURT: Okay. And that we touched on in the
20 last status conference, and that case is not included in the
21 current motion to dismiss. So that's not the *Robinson* that
22 I have as a non-response, because that -- the *Robinson*, the
23 non-response *Robinson* is a hyphenated and it is 17-5123.

24 MR. WALKER: Okay. Thank you for clarification,
25 Your Honor. That is the confirmation with me.

1 THE COURT: Okay. Anyone on the phone for
2 *Resendez, Keith or Erdman?*

3 UNIDENTIFIED FEMALE SPEAKER: Yes. This is Brown
4 & Crouppen.

5 THE COURT: And who do you represent?

6 UNIDENTIFIED FEMALE SPEAKER: *Erdman, Greene and*
7 *Keith.* And we are not opposed.

8 THE COURT: Okay. And what about *Erdman or*
9 *Resendez?*

10 UNIDENTIFIED FEMALE SPEAKER: I apologize. I did
11 not mean *Greene.* It's *Erdman, Keith and Resendez.* We are
12 not opposing.

13 THE COURT: Okay. *Erdman, Keith and Resendez* then
14 are dismissed. *Greene* is dismissed.

15 I gather from the fact that we previously
16 discussed the *Robinson-Bessicks* that there must not be
17 anybody on the phone for that case. But just to clarify,
18 going once, going twice, anybody represent that case? All
19 right. That case is dismissed.

20 And, Mr. Morris, is it, on you, I am going to
21 dismiss that.

22 MR. MORRIS: All right, Your Honor.

23 THE COURT: Okay. Thank you, all. I'm going to
24 mute the call again. Thank you all very much.

25 Now, turning to the cases where we received

1 responses, *Hickman*, which is 17-cv-3696 --

2 I guess I will unmute again just in case counsel
3 for *Hickman* is on the phone.

4 MR. HODGES: Your Honor, *Hickman* I believe is
5 mine, and we will stand on the papers.

6 THE COURT: Okay. No contact with *Hickman*.

7 *Hickman* will be dismissed, is dismissed, I should say.

8 Key, 17-cv-4779. Unable to contact.

9 MR. HODGES: The same with that one, Your Honor.

10 THE COURT: Okay. Key is dismissed.

11 *Opperman*, 17-cv-3563. Unable to contact.

12 MR. HODGES: Yes, Your Honor.

13 THE COURT: Okay. Dismissed.

14 *Seymore*, 17-cv-3718, dismissed.

15 MR. HODGES: (Moves head up and down.)

16 THE COURT: *Richey* or *Richey*, 17-cv-5323.

17 MR. HODGES: Your Honor, that was on the court's
18 docket last month. The court denied the motion. My
19 understanding is that -- I believe the defendants are
20 complaining about a late-filed motion to substitute. This
21 is the one, if the court recalls, that --

22 THE COURT: So there was a hearing in front of
23 Magistrate Judge Noel; is that right? Here's what I think I
24 know about that case. Tell me if this is right. I know we
25 had it on the last hearing.

1 MR. HODGES: Correct.

2 THE COURT: And I denied the defendants' motion to
3 dismiss.

4 MR. HODGES: Correct.

5 THE COURT: And then there was -- somebody might
6 have died, maybe?

7 MR. HODGES: They did die. They were dead at the
8 last hearing as well.

9 THE COURT: Did die.

10 MR. HODGES: The court denied the motion under PTO
11 -- their complaint was under PTO 14.

12 THE COURT: Right.

13 MR. HODGES: I believe their complaint now, and
14 Mr. Hulse can correct me if I am wrong, is pursuant to
15 PTO 23.

16 THE COURT: So, let's see, at the hearing in July
17 Judge Noel denied the motion to dismiss without prejudice to
18 allow substitution.

19 MR. HODGES: Correct.

20 THE COURT: And there was no deadline. And then
21 there was a written follow-up order that denied without
22 prejudice to allow additional time to contact the
23 appropriate heir and provide a complete PFS. Then
24 August 2nd of this year defendants again moved -- was that
25 under 14 or 23?

1 MR. HULSE: We have motions under both, Your
2 Honor.

3 THE COURT: Okay.

4 MR. HODGES: The one under 14 was denied
5 previously.

6 MR. HULSE: Right. And we --

7 THE COURT: But they said they again moved, and I
8 just don't know whether they again moved under 14 or 23. Do
9 you know?

10 MR. HULSE: Well --

11 THE COURT: Okay. Well, anyway, okay. So there
12 was a new and/or renewed motion to dismiss filed just
13 August 2nd for failure to comply. There's one failure to
14 comply with 14, and that motion is currently before the
15 court. And there was also a PTO 23 motion filed, and
16 there's a hearing set on that or was.

17 MR. HULSE: Correct.

18 THE COURT: There is a hearing on that for
19 September 20th.

20 MR. HULSE: For September 20th, yes, Your Honor.

21 MR. HODGES: I would ask that the court allow us
22 some time, obviously more than between one status conference
23 to another, to substituting a party. We can argue the --

24 THE COURT: Why don't you just argue the whole
25 thing on the 20th?

1 MR. HODGES: I am happy to do so.

2 MR. HULSE: That would make sense to us, Your
3 Honor.

4 THE COURT: All right.

5 MR. HULSE: I believe, Your Honor, those PTO 23
6 motions are currently noticed before Your Honor because they
7 are dispositive. Should we re-notice them in front of
8 Judge Schultz?

9 THE COURT: I am trying not to get to those yet.

10 MR. HULSE: All right, Your Honor.

11 THE COURT: Let me finish the current list. I
12 have some things I want to say about that one, I mean, after
13 I hear from you.

14 MR. HULSE: Of course, Your Honor.

15 THE COURT: I do recall that you didn't give the
16 adequate time, but we're not talking about that right now.

17 And then there was a single opposition filed in
18 eight cases. One is *Pine*. So we're talking about *Pine*,
19 4777, *Brown*, 4778, *Potter*, 4881, *McEvoy*, 4885, *Hardy*, 5261,
20 *Taplin*, 5370, *Bresnock*, 5371, and *Swales*, 18-cv-45.

21 Should we go through those individually?

22 MR. HULSE: Yes, Your Honor. There is sort of a
23 cross-cutting issue that would apply to all of them. This
24 is the issue of the sufficiency of a do-not-recall response.

25 MR. LEE: This is Dae Lee from Bernstein Liebhard

1 on behalf of all these plaintiffs.

2 THE COURT: Okay. Could you repeat your name,
3 please?

4 (Discussion with court reporter.)

5 THE COURT: All right. If you would tell us your
6 name once more, sir, and also spell your last name, that
7 would be helpful for the court reporter.

8 MR. LEE: First name is Dae, D-a-e. Last name is
9 Lee, L-e-e.

10 THE COURT: Thank you. And you represent all
11 eight of the cases that I just listed?

12 MR. LEE: Yes, Your Honor.

13 THE COURT: Mr. Hulse, let me hear from you on
14 your motion to dismiss these cases.

15 MR. HULSE: Your Honor, there are unique issues
16 for each one of them, but the cross-cutting issue is the
17 sufficiency of a do-not-recall response in PFS. We
18 recognize there are some questions where a do-not-recall
19 response is appropriate; however, the particular ones that
20 are at issue here that we have raised are issues such as the
21 date of discovery of the injury and the date of discovery
22 that the Bair Hugger was used.

23 Our belief is that do-not-recall answers are
24 insufficient for those. These are matters that, first off,
25 should be one that one can recall or one can recall and

1 determine with the assistance of counsel. The PFS requires
2 a reasonable investigation. It draws not just on the
3 knowledge of the plaintiff or the memory of the plaintiff,
4 but what they can determine with their counsel. And for us
5 it simply defies credibility that one would not be able to
6 state the date of the onset of symptoms that are sued on and
7 the date of the determination that the Bair Hugger had been
8 used. Both those questions call for approximate date. They
9 don't require a specific date. And so that's an additional
10 reason why a do-not-recall answer is insufficient.

11 THE COURT: And notices of deficiency were
12 provided, correct?

13 MR. HULSE: Absolutely, Your Honor.

14 And I would say overwhelmingly plaintiffs in their
15 PFSs have answered this question. This is a subset of cases
16 where we have a disagreement with a particular plaintiff's
17 counsel about the sufficiency of these responses.

18 THE COURT: Mr. Lee.

19 MR. LEE: Yes, Your Honor. Your Honor, all these
20 plaintiffs answered the questions to the best of their
21 ability and their recollection. And, you know, if the
22 defendants insist, then, you know, I'll go ahead and then
23 try to walk them through, the plaintiffs, to at least
24 provide some sort of approximate date of recollection, if
25 possible, but I can't force them to answer especially if

1 they don't recall. I mean, with my assistance, I'm going to
2 try to have them provide some sort of -- some sort of an
3 answer, so defendants could use their fact sheet.

4 THE COURT: Mr. Hulse, is this relevant to statute
5 of limitations?

6 MR. HULSE: Absolutely, Your Honor, and that's why
7 it's important. We anticipate that at some point we will
8 file a motion against a very large swath of cases where the
9 PFSs have indicated and that the statute of limitations has
10 run, and so it's vital that we have this information to be
11 able to do so.

12 THE COURT: Does that apply, the date question,
13 does that apply to all eight of these cases?

14 MR. HULSE: I believe so. Yes, Your Honor.

15 THE COURT: Is that right? Is that your
16 understanding too, Mr. Lee?

17 MR. LEE: Yes, Your Honor.

18 MR. HULSE: And, Your Honor, as I mentioned, we do
19 have specific additional deficiencies for each one of these
20 PFSs beyond this issue.

21 THE COURT: Let's start with *Pine* then.

22 MR. HULSE: All right. So in *Pine* plaintiffs
23 haven't disputed that they have not answered Sections 2.6
24 and 9. Those are core deficiencies. And so we would say
25 separately it should be dismissed on that ground.

1 THE COURT: Mr. Lee.

2 MR. LEE: Your Honor, I don't see why Section 2.6
3 is a core deficiency. It is asking for the last ten -- the
4 last ten years, and plaintiff does not recall. And if the
5 court permits, I will ask my client to supplement this
6 section to the best of his ability and recollection. And
7 I'm not sure where Section 2.9 was raised in their motion.

8 MR. HULSE: It's 9, Your Honor.

9 THE COURT: Pardon me?

10 MR. HULSE: 9.

11 THE COURT: 9?

12 MR. HULSE: Not 2.9.

13 THE COURT: 2.9?

14 MR. HULSE: 9. Sorry. Not 2.9, but 9.

15 THE COURT: Oh. Not 2.9, but just 9.

16 MR. HULSE: It's the loss of consortium section.

17 THE COURT: Loss of consortium.

18 MR. LEE: Right. Your Honor, the 9, about the
19 loss of consortium, plaintiff provide the answer, but they
20 also add where plaintiff was married, and I don't see why
21 this is a core deficiency.

22 THE COURT: Okay.

23 MR. HULSE: I would add, Your Honor, if I may,
24 that we only raise core deficiencies. The parties, co-lead
25 counsel and defendants, agreed on what were core

1 deficiencies. Those are the deficiencies that will result
2 in dismissal with prejudice if not completely answered.

3 THE COURT: And just to make sure that notice of
4 that was available, that's contained in one of the orders.

5 MR. HULSE: Yes. That's the -- the PFS, which is
6 PTO 14, is very clear on this, that there is core
7 deficiencies and there are non-core deficiencies, and core
8 deficiencies are the ones where you go through this process.
9 And if the deficiency is not cured through the two, notice,
10 process, then the penalty is dismissal with prejudice.

11 THE COURT: And that determination has been long
12 since made?

13 MR. HULSE: In I think 12 or 15 orders at this
14 point. Yes, Your Honor.

15 THE COURT: With respect to the *Brown* case?

16 MR. HULSE: The *Brown* case, the plaintiffs --
17 plaintiff here doesn't dispute the core deficiencies in 6.3
18 and 9.

19 THE COURT: Is that true, Mr. Lee?

20 MR. LEE: I'm sorry, Your Honor. I missed the
21 last part. Section 6.3 and --

22 MR. HULSE: 9.

23 THE COURT: 9. That's the consortium one again.
24 Right?

25 MR. HULSE: Correct, Your Honor.

1 MR. LEE: And, Your Honor, before -- motion to
2 dismiss, within their motion to dismiss, that's the first
3 time we are aware -- we became aware of any specificity to
4 the deficiency. In their deficiency letter that were sent
5 to us prior to filing the motion to dismiss it only says the
6 section was incomplete. And we were never -- we were never
7 aware of it, you know, until they filed the motion to
8 dismiss as to the specificity of the deficiency of each PFS.

9 MR. HULSE: Your Honor, I think it's undisputed
10 that they were notified of it in our deficiency letter that
11 we identified it as incomplete. If there were any questions
12 about it, there were three months for plaintiff's counsel to
13 get in contact with us and ask us for further clarification.
14 Every day we handle dozens of communications from
15 plaintiffs' counsel about PFS deficiency notices.

16 THE COURT: Mr. Lee, as I understand it, there was
17 a deficiency notice given and the deficiency notice said
18 that certain answers were incomplete. But your objection to
19 the specificity of the deficiency notice with respect to the
20 PFS on *Brown*, 17-cv-4778, is that the deficiencies weren't
21 more particularly articulated?

22 MR. LEE: No, Your Honor. I just wanted the court
23 to know that there was no specificity in their deficiency
24 letter. And I'm not sure whether I have spoken with defense
25 counsel specific to this case, but I have spoken with the

1 defense counsel before and we weren't -- I wasn't able to
2 cure the deficiency.

3 THE COURT: I see.

4 MR. LEE: So I believe one of the -- I believe I
5 spoke with defense counsel on one of the cases that is in
6 front of you. So my objection to their motion to dismiss in
7 particular regarding the core deficiencies, for example, the
8 plaintiff does not recall, then with the court's permission,
9 you know, I will do my best to jog through my client's
10 memory and then try to have the client give some sort of
11 approximate answer and all the other core deficiencies as
12 defendant alleged, such as the place of marriage, and we
13 will try to supplement it with the court's permission.

14 THE COURT: Okay. *Potter*, 17-cv-4881?

15 MR. HULSE: There's no dispute about Section 7.1,
16 but that's -- that remains deficient. There are other ones
17 we think remain deficient that plaintiff disputes, but there
18 doesn't seem to be any dispute on 7.1, which is the past
19 wage -- pardon me -- past wage loss.

20 THE COURT: Mr. Lee.

21 MR. LEE: Yes, Your Honor. The client is looking
22 for the past wage information, and that's what the plaintiff
23 noted in the PFS. And with the court's permission, we will
24 try to supplement it or have the client withdraw the
25 economic damages portion of her complaint.

1 THE COURT: *McEvoy*, 17-cv-4885. Mr. Hulse.

2 MR. HULSE: There's no dispute apparently that
3 Section 6.1, which is the section on physical injury, is not
4 completely answered. That's not disputed in plaintiff's
5 opposition.

6 THE COURT: Mr. Lee.

7 MR. LEE: Your Honor, Section 6.1 asks for the
8 date when the plaintiff became aware of the injury. As
9 stated before, plaintiff answered plaintiff does not recall
10 because the plaintiff doesn't recall. And, again, I will
11 try my best to jog through my client's memory and with my
12 assistance provide some sort of approximate answer to that
13 with the court's permission.

14 THE COURT: Mr. Hulse, *Hardy*, 17-cv-5261.

15 MR. HULSE: Right. There does not appear to be
16 any dispute that Section 6.3, which is the emotional
17 distress question, is not sufficiently answered.

18 THE COURT: Mr. Lee.

19 MR. LEE: Your Honor, we will -- I will have my
20 client answer the question with your permission to the best
21 of his ability.

22 THE COURT: Mr. Hulse, *Taplin*, 17-cv-5370.

23 MR. HULSE: This is another one where it does not
24 appear that there is any dispute that 6.1, which is about
25 physical injury, that it was not answered completely.

1 THE COURT: Mr. Lee.

2 MR. LEE: Your Honor, I will talk to my client,
3 and then with my assistance I will have my client provide
4 some sort of approximate answer to that question.

5 MR. HULSE: And just for the record, I was
6 incomplete. There is also no dispute about 2.10, 4.7 and
7 4.8.

8 THE COURT: *Bresnock*, 17-cv-5371.

9 MR. HULSE: Your Honor, no dispute as to the
10 deficiency of Sections 7.1, 7.2 and 2 -- yes, 2.15.

11 THE COURT: Mr. Lee.

12 MR. LEE: Your Honor, 7.1 and 2 asks for the
13 economic damages, and plaintiff is gathering the requested
14 information. And I will, with the court's permission, will
15 supplement this section. And what was the other sections,
16 Your Honor?

17 THE COURT: I understand that they were 7.2 and
18 2.15.

19 MR. HULSE: Right. Correct, Your Honor.

20 MR. LEE: 2.5?

21 THE COURT: 2.15.

22 MR. LEE: I'm sorry, Your Honor. I don't think
23 2.1 was raised in their motion.

24 MR. HULSE: 2.15.

25 THE COURT: Do you hear that? 2.15. 2.15.

1 MR. LEE: Okay. Part 15. Okay. Internet
2 posting?

3 MR. HULSE: Correct. Yes. It's about internet
4 postings reviewed on the Bair Hugger. It's relevant to --

5 THE COURT: Yes, we're looking at the same one.

6 MR. LEE: Okay. Plaintiff does not recall the
7 actual web address. And, I mean, I will try to jog through
8 my client's memory and then try to supplement this section,
9 but it's hard to remember the actual address. And I don't
10 know what information the defense counsel is actually
11 looking for besides the web address. I mean, I would
12 appreciate it if the defense counsel could elaborate on what
13 information besides the web address that they are looking
14 for.

15 THE COURT: Mr. Hulse, *Swales*, 18-cv-45.

16 MR. HULSE: There is no dispute about the
17 insufficiency of 5.4 and 7.1 and also 6.1.

18 THE COURT: Mr. Lee.

19 MR. LEE: Your Honor, 5.4 asks for disability
20 information, and 6.1 asks for the date when plaintiff became
21 aware of the injury, and, again, I'll have my client provide
22 and supplement this section to the best of her ability. And
23 specific to 6.1, with the court's permission, we will
24 definitely supplement that section.

25 THE COURT: There are at this point core

1 deficiencies in each of the eight cases. So the question is
2 whether these eight plaintiffs should be allowed additional
3 time to get their answers straightened out. The previous
4 court orders have made it plain that these core deficiencies
5 have to be resolved and they needed to be resolved by this
6 point. It is not adequate to await further court order with
7 respect to each one of these cases specifically directing
8 that an adequate PFS be filed.

9 It sounds like one of the plaintiffs -- I think is
10 it Bresnock -- is actually working on an answer, on a better
11 answer.

12 MR. HULSE: It wasn't clear to me, Your Honor.

13 THE COURT: Mr. Lee, did you talk -- were you
14 talking about McEvoy or Bresnock was actively working on an
15 improved response?

16 MR. LEE: Give me one second, Your Honor. I am
17 sorry. It's Bresnock is gathering the requested
18 information. She's actively looking for additional
19 information.

20 THE COURT: All right.

21 MS. ZIMMERMAN: Your Honor, may I be heard on one
22 point?

23 THE COURT: Sure. Thank you, Ms. Zimmerman.

24 MS. ZIMMERMAN: So I just pulled up Pretrial Order
25 No. 14, which is the PFS order, and at paragraph 4 the

1 parties did define a core deficiency and that is defined as
2 a lack of response to all of the defined questions, which
3 from the plaintiffs' perspective is not the same as saying I
4 don't recall. Those are different. So not responding at
5 all is different than responding and saying the plaintiff
6 doesn't recall. So for those reasons, given the stipulated
7 order language with respect to core deficiency definition,
8 we would request that the plaintiffs be afforded the
9 opportunity to supplement to the extent that defendants
10 require additional information.

11 THE COURT: But once the deficiency notice is
12 given and there is no response to that, doesn't that change
13 the --

14 MS. ZIMMERMAN: Well, I don't know that it -- it
15 certainly doesn't change the definition of what constitutes
16 a core deficiency. And that's really what triggers the
17 ability of the defendants to come before Your Honor at these
18 status conferences to ask that cases be dismissed.
19 Certainly, I can understand why defendants want to have
20 information about when perhaps the plaintiff learned about a
21 Bair Hugger was used on them.

22 THE COURT: Well, you have to. I mean, everybody
23 does. It's not just the defendant. Everybody has to know
24 when it happened or we don't know whether we have a case or
25 not.

1 MS. ZIMMERMAN: Absolutely, Your Honor.

2 THE COURT: So it just goes without saying that if
3 you -- if you say you can't recall and then, then you get a
4 notice that says this is not enough, given that it is
5 essential to a statute of limitations defense, that to rely
6 on --

7 MS. ZIMMERMAN: The definition of the --

8 THE COURT: Maybe it's the wrong way to dismiss
9 it, but you can't, like, you can't have a case if you don't
10 know when it arose at some point.

11 MS. ZIMMERMAN: Certainly.

12 THE COURT: And there's been enough time to answer
13 that question, so --

14 MS. ZIMMERMAN: With respect to some of that, I
15 think that's right, but if it's something as where you got
16 married, well, I hope people remember that.

17 THE COURT: Yeah, I definitely see that.

18 MR. HULSE: And we agree.

19 THE COURT: I was looking -- correct me if I am
20 wrong, but, to both of you, I was listening to the
21 deficiencies that weren't the date deficiencies with a
22 background of we didn't have the date to begin with. So
23 that's my primary concern.

24 And I completely agree that if you can't remember
25 exactly when you got married, you are probably just part of

1 the rest of the 95 percent of the population.

2 So it's the initial answer "I don't know when the
3 case arose" and then you receive a notice that you have to
4 answer this and then you don't answer it that is causing me
5 concern, because if we wait, we come to court and only when
6 we come to court do we have to go through this exercise with
7 respect to each case and then I order it, that's
8 inconsistent with the order that we issued early on. And
9 so --

10 MR. NIGH: Your Honor, this is Daniel Nigh. May I
11 be heard on this issue?

12 THE COURT: Who are you again? Are you Mr. Lee?

13 MR. NIGH: No. This is Daniel Nigh. And I'm
14 asking to be heard on this issue because I have about
15 50 cases that are listed for persistent deficiencies,
16 despite my offense to answer the question adequately, and
17 it's the same issue.

18 THE COURT: I don't have those motions in front of
19 me.

20 MR. HULSE: No. This is just on a list for a
21 future month.

22 THE COURT: Okay. We don't --

23 MR. NIGH: There is no motion at this time.

24 THE COURT: No, there is not a motion at this
25 time.

1 MR. NIGH: No, but it's a similar issue that I
2 know is going to come up in my cases.

3 THE COURT: Bearing in mind that there's no motion
4 and I don't have any actual -- anything in front of me on
5 your cases, is there some supplementation to Ms. Zimmerman's
6 general comment that you want to make? I can hear that.

7 MR. NIGH: Yes, Your Honor. Yes. The issue that
8 I have is this, and it involves a line similar to what
9 Mr. Bernstein or the attorney for Bernstein Liebhard is
10 addressing, is that --

11 THE COURT: Mr. Lee.

12 MR. NIGH: -- this question is asking when
13 plaintiff's first had knowledge that a Bair Hugger was
14 utilized. The issue is that for most of my cases, the vast
15 majority of these cases, they don't know that a Bair Hugger
16 product was utilized when they first contacted an attorney.
17 And so, first, we're diving into information that may
18 actually be protected by the attorney-client privilege, but
19 then, second, we're diving into information that I don't
20 actually keep a record of the specific dates that we tell
21 the client, oh, yes, we actually confirmed that you had a
22 Bair Hugger product utilized; but I don't know if that's the
23 issue for Mr. Lee, but that's the issue for me; and I have
24 explained that on multiple occasions, and I am being told
25 that it is still deficient in that response.

1 THE COURT: Okay. So just to -- okay. Thank you,
2 Mr. Nigh.

3 Ms. Zimmerman, I think what he's saying is that
4 he's reading the PFS to ask when the attorney first told the
5 client and so that would be asking for attorney-client
6 information? That is not how anybody has been interpreting
7 it so far. Can you help enlighten us on that?

8 MS. ZIMMERMAN: I will try to do that.

9 And I think that what Mr. Nigh was getting at is
10 that some of the clients, when they call a lawyer, they
11 hear, perhaps they see a television commercial or something
12 like that saying do you have a deep joint infection and they
13 call a lawyer. They don't have any idea --

14 THE COURT: Right.

15 MS. ZIMMERMAN: -- what might have caused it or
16 whether it was used on them. And so while they may call a
17 lawyer, say, June 1st, when that lawyer ultimately confirms
18 by getting the medical records that a Bair Hugger was in the
19 billing records or some other place in that person's medical
20 record to confirm Bair Hugger use, the plaintiff may well
21 not know.

22 So I think perhaps what we ought to do is work
23 together on getting some clarifying language on exactly what
24 the defendants need. And perhaps we can, you know, work
25 together on a proposed Amended Pretrial Order 14, so that

1 the defendants certainly get the information that they think
2 is necessary, but that we don't trouble the court either
3 with deficiencies about something perhaps that's trivial.
4 And I understand that that is sounding to be a supplement.

5 THE COURT: Well, the vast majority of plaintiffs
6 don't misunderstand the PFS that way.

7 MS. ZIMMERMAN: I hope not, but I think that there
8 is some room for disagreement, because the way that the PFS
9 is posed to the plaintiffs, it's who is completing this form
10 first person. And so while the law firms typically will try
11 to assist the plaintiff in filling out these forms, it does
12 seem, you know, to read when did the plaintiff learn about
13 this and a lot of times the plaintiffs don't know. You
14 know, they say my lawyer told me.

15 THE COURT: But then the attorneys supplement.

16 MR. NIGH: And Your Honor --

17 THE COURT: Okay. No. Wait. I've got -- I'm
18 hearing first from the lawyers who are here.

19 Is that Mr. Nigh again?

20 MR. NIGH: Yes. Just to be clear --

21 THE COURT: Okay, Mr. Nigh. All right. One more
22 -- one more thing and then I --

23 MR. NIGH: During my meet and confer with
24 defendants' counsel on how to respond to this, when I
25 advised them that my clients don't recall the date, they

1 said that was deficient and that I needed to provide the
2 date that I notified my plaintiffs that the Bair Hugger was
3 used. That's where that came from.

4 THE COURT: Okay. So now we are going to focus
5 our attention on the motions that are actually before the
6 court.

7 And, Ms. Zimmerman, on the cases that I heard from
8 Mr. Lee on, with respect to the 6. -- 6.1 is the real
9 question, and then there were the additional problems.

10 (U.S. Marshal entered the courtroom.)

11 THE COURT: Fifteen minutes. Thank you.

12 That was, for those of you on the phone, that was
13 the marshals trying to bring in my 11 o'clock criminal
14 matter.

15 So, Ms. Zimmerman, anything on the eight that we
16 went through with Mr. Lee?

17 MS. ZIMMERMAN: I think that Mr. Lee has covered
18 the motion with respect to his clients well --

19 Somebody put us on hold. Don't do that, please.

20 THE COURT: I muted them.

21 MS. ZIMMERMAN: Thank you.

22 It's also --

23 THE COURT: So I guess the thing that I want to
24 make sure of is that the state of these cases, these eight
25 cases, is such that even to this date we do not collectively

1 have information about whether they -- about when the
2 statute of limitations would begin to run. And so we're
3 talking about, quibbling about how the PFS is worded or how
4 it is read. But even now in the middle of August of 2018 we
5 still don't know when the cause of action, you know, when
6 the plaintiff found out about it or when the operation
7 occurred, right?

8 MS. ZIMMERMAN: So for the most part I think that
9 we do, though, know when the operation took place, but when
10 the operation took place and when the plaintiff finds out
11 that the Bair Hugger was used on them are frequently years
12 and years and years apart, because it's placed on them when
13 they are asleep.

14 THE COURT: Right, but we don't know.

15 MS. ZIMMERMAN: I think that in some limited
16 number of cases there is still information, you know, that
17 hasn't been developed on that front.

18 And my office reports to me that this issue with
19 respect to the plaintiff fact sheet and the use of Bair
20 Hugger was not previously identified as a deficiency in
21 essentially the last couple of years and that this is a new
22 deficiency that is being reported.

23 We are happy to work together and make sure that
24 they get all the information that they need, but to the
25 extent the previous PFSs that reflected I don't recall, but

1 that was sufficient, if the defendants' practices have
2 changed, I think that, you know, in fairness to Mr. Lee and
3 the other plaintiffs that he represents that we ought to be
4 able to try to work through these disagreements or
5 misunderstandings rather than dismiss a case completely with
6 prejudice.

7 MR. HULSE: We have actually raised it repeatedly.
8 We just had no one -- had ever had anybody fight us on this
9 before. So this seemed to be something that we -- and I
10 think, you know, Ms. Zimmerman's firm and 90 percent of
11 firms have all been on the same page on this, and this is a
12 new dispute for us just because we've never had disagreement
13 on it before.

14 THE COURT: Is it August 20th you are going to be
15 in front of Judge Schultz?

16 MS. ZIMMERMAN: I don't think we have a date yet,
17 but --

18 THE COURT: Oh, sometime. Sometime next week, I
19 am guessing.

20 MS. ZIMMERMAN: You are guessing? You think you
21 might have it on good authority?

22 MAGISTRATE JUDGE SCHULTZ: I suppose I should tell
23 them.

24 THE COURT: You don't have to tell them right now.

25 MAGISTRATE JUDGE SCHULTZ: Okay.

1 THE COURT: Okay. On these eight cases, Mr. Lee,
2 you have got two weeks to cure these deficiencies.

3 And when counsel is before Judge Schultz next or
4 whenever you are next in front of him, hammer this out. And
5 if there's some amendment that needs to be made, I am not
6 seeing it right now, but if there is something, then we can
7 bring that up.

8 But, Mr. Lee, you have got two weeks to cure your
9 deficiencies.

10 Mr. Nigh, I'd get those deficiencies definitely
11 cured before the next pretrial conference so that we -- so
12 that when we -- if there's a motion on your 50 cases, we
13 have got all the information necessary and we can have a
14 meaningful conversation about them.

15 Ms. Zimmerman, is that --

16 MS. ZIMMERMAN: That's fine. Thank you, Your
17 Honor.

18 THE COURT: Okay. All right. So that's how we
19 will take care of that.

20 Now, on the Rule 11 motion on the 169 cases.

21 MR. HULSE: I'm going to call up my colleague Mary
22 Young at this point.

23 THE COURT: Yes, Ms. Young.

24 My first problem with this motion has to do with
25 the timing and the safe harbor. And I know that there are

1 exceptions to the safe harbor, but absent invocation of one
2 of those what I consider to be very extraordinary
3 exceptions, why is the failure to give the 21 days not
4 reason enough to deny this motion?

5 MS. YOUNG: Well, Your Honor, the motion that's
6 before the court is not asking for any sanction. It's
7 asking for the rule -- the order to show cause under Rule
8 11(c). And at that point is when we would ask that a
9 sanction of dismissal with prejudice be entered for any case
10 where they have not come forward and amended the PFS to show
11 that the product was in fact used and had the right
12 evidentiary support for that contention.

13 THE COURT: Fair enough. But I think about let's
14 say I do that. Then I have to go through all of these,
15 right? I don't even have the PFSs. I mean, I would just
16 have to take your word on what's in them. So first I would
17 have to get the PFSs, because those aren't filed with the
18 court, so I don't know whether they are really deficient. I
19 mean, I would have to get them and then individually docket
20 every one of the responses that comes in on the motion. And
21 we have the PFS process that contrary to the discussion we
22 just had, which makes it look like -- I mean, we had a
23 little lump, bump in the road there, but basically we have a
24 process by which these many, many cases can be addressed
25 without individual attention from the court. And so my

1 inclination is to consider this motion to be firm notice to
2 the plaintiffs who are listed in these 169 cases of
3 significant and serious deficiencies in the PFS, but to
4 allow those cases to go through that process that has
5 essentially been working pretty well and doesn't -- well,
6 it's been working pretty well.

7 Am I missing something? I know you don't agree
8 with that approach, but am I missing some fundamental
9 component here?

10 MS. YOUNG: Well, Your Honor, our view on this
11 question is that this goes to really a threshold issue --
12 it's been before the court on numerous occasions -- Are
13 these actual product liability cases that relate to the Bair
14 Hugger. So it's not so much that there is a deficiency in
15 the response. This really goes to a threshold issue of Is
16 there a claim. And as we have seen in the history of this
17 litigation, there have been very serious issues with that.
18 We had two of five bellwether cases fall out after
19 significant resources.

20 You put in place a mechanism by which we would try
21 to get to product ID in the second pool, and it ended up we
22 negotiated with Judge Noel that we would just put those
23 issues to the side, but we do see that we are going to need
24 court intervention substantively because the parties
25 fundamentally disagree as to what it is. It's required to

1 show proof of product use here. And these are just really
2 the tip of the iceberg. These are cases where the
3 plaintiffs in their own verified response have said we don't
4 have evidence the product was used. And so our view was we
5 want to come to the court and have -- ask for the court's
6 guidance in how best to begin to address what we see as very
7 significant issues with the validity of many, many cases in
8 the docket.

9 THE COURT: Here's the issue that I have with
10 considering an attorney sanction motion based on a PFS that
11 may have been answered only by the plaintiff him or herself.
12 I completely agree that we worked very hard on coming up
13 with a PFS process so that we can have -- we can separate
14 the wheat from the chaff. And it's disheartening to the
15 court to learn that plaintiffs and their counsel in some
16 rare instances may not be cooperating with the spirit of
17 that and just have a plaintiff submit something and don't do
18 any individual research. And I certainly understand where
19 Rule 11 would cross your mind in that situation.

20 I'm not going to entertain the -- I'm not going to
21 do what you want now, but I also am not going to continue,
22 if we have so far, countenancing a plaintiff's response that
23 we handed it to the plaintiff, the plaintiff didn't know
24 anything and so here we are and we are not going to do
25 anything more.

1 So the question is, Who is going to go through
2 each one of these cases and make sure they are a real case?
3 And on the order to show cause, that's got to be me. And I
4 just think that's not -- doesn't have to be me. I'm happy
5 to do it if it has to be, but it shouldn't have to be,
6 because here you say plaintiff says no. I don't know what
7 the attorney says. And I want the attorney to say it -- you
8 know, I want you and the attorneys, and this will be Ms.
9 Zimmerman and her crew, to work it out and figure out
10 whether there really is a case. And then if you have got
11 somebody who is told there is a PFS deficiency, they are
12 told they have to tell whether there is a case, they still
13 don't do it, then come to me in those cases, but I hope we
14 don't have 165 plus or a hundred -- whatever it is, the
15 breakdown. I hope we don't have 169 cases where that is the
16 case.

17 So I am going to put this on your list of things
18 to discuss before you come back to court before Judge
19 Schultz and hopefully work out some sort of a resolution;
20 and if not, then bring it to Judge Schultz's attention.
21 Okay?

22 MS. YOUNG: Okay. Thank you, Your Honor.

23 THE COURT: Thank you.

24 Ms. Zimmerman, I didn't hear from you on that,
25 but --

1 MS. ZIMMERMAN: Your Honor, we were prepared to
2 provide argument, but we are happy to just work per your
3 instructions.

4 THE COURT: Okay. Thank you.

5 Now, I just want to make sure we have covered
6 everything on the joint agenda.

7 MR. HULSE: Your Honor, we also have one of the
8 PTO 23 motions noticed for today. This is about
9 substitution suggestions of death.

10 THE COURT: Yes. I'm just looking for that.

11 MR. HULSE: It's on the agenda at the very tail
12 end at the bottom of No. 8, Other Motions.

13 THE COURT: It says the first of these is noticed
14 for August 16th and the second for August 20th.

15 MR. HULSE: And that should say September 20th,
16 Your Honor, the next status conference.

17 THE COURT: Okay. So, yes, we have some deceased
18 plaintiffs to cover. Mr. Hulse. These are -- is this -- so
19 on the deceased list I have got *Colon, Perkins, Andrews,*
20 *Bellande*. Am I on the right --

21 MR. HULSE: You are in the right place, yes.

22 There are six cases, and I think you've said most of them.

23 THE COURT: All right. So the *Colon* case,
24 16-cv-985, there was no response and so that will be
25 dismissed.

1 MR. HULSE: Correct. Well, correct, there was no
2 response.

3 THE COURT: Perkins died May 9, 2017. PTO 23 was
4 issued on January 8th of 2018. The suggestion of death came
5 before that in November of 2017. So the motion to
6 substitute was due February 12th of 2018.

7 MR. HULSE: Correct, Your Honor.

8 THE COURT: I think actually you say February
9 11th.

10 MR. HULSE: We said the 11th.

11 THE COURT: I think it is February 12th, but
12 anyway in February. And there was no motion. Then there
13 was the order to show cause. July 17th counsel for
14 plaintiff Perkins filed a response to that, even though I
15 guess there was nothing on the docket requiring --

16 MR. HULSE: I think technically there was no order
17 to show cause.

18 THE COURT: There was no, but anyway that was
19 right.

20 MR. HULSE: It was a misnomer on the --

21 THE COURT: Yes, but still something came in on
22 the 17th.

23 MR. HULSE: Right.

24 THE COURT: And that's how it was nominated.

25 Daughters want to be or at least expressed some interest in

1 being executors of the estate, but they can't reach them
2 anymore, so that went nowhere.

3 MR. HULSE: Right. According to plaintiff's
4 counsel, one is not interested, expressly said they are not
5 interested, and the other is not responsive. And we are now
6 six months overdue on the substitution deadline.

7 THE COURT: Anybody want to be heard on *Perkins?*
8 *Perkins* is dismissed.

9 Andrews died July 25th, 2017. Suggestion of death
10 November of 2017. Then, of course, the order came on
11 January 8th. This is the one where there was a hearing in
12 front of Judge Noel, right?

13 MR. HULSE: That's right. That's right.

14 THE COURT: Okay. So now -- and this, there was
15 an order to show cause issued?

16 MR. HULSE: Correct.

17 THE COURT: And that said five days from June 4th.
18 You say why the substitution shouldn't be denied. And then
19 nothing came in.

20 MR. HULSE: Correct.

21 THE COURT: So then you made a motion to dismiss,
22 and Judge Noel denied that because -- "The Court cannot
23 conclude that Price is Andrews' successor or
24 representative." Oh, denied the motion to substitute.

25 MR. HULSE: Right, right.

1 THE COURT: All right. So why should that not be
2 dismissed? Anybody want to speak on that?

3 MS. ZIMMERMAN: No, Your Honor.

4 THE COURT: Okay. That's dismissed.

5 *Bellande, et al.*, 16-cv-2700. Death occurred just
6 this past April. Suggestion of death comes June of 2018.

7 MR. HULSE: The death was actually December 2017,
8 Your Honor.

9 THE COURT: Oh. Because I thought what was the
10 problem there? Oh, I see. So the death happened then.
11 Then we have got the order.

12 MR. HULSE: Right, which gives everybody a safe
13 harbor at that point.

14 THE COURT: So the due date for the suggestion of
15 death was April and it didn't come in till June.

16 MR. HULSE: Correct, Your Honor.

17 MR. HODGES: Your Honor.

18 THE COURT: And then let me just -- hold on.
19 Okay.

20 MR. HODGES: Yes, Your Honor. David Hodges here
21 on behalf of the Bellandes.

22 This is an impossibility of performance situation
23 where we learned about the death -- the date you mentioned
24 was April 17th of 2018. There's no way that we could have
25 gotten it on file within those 90 days obviously because we

1 didn't learn until after the 90 days. This isn't willful
2 disobedience of a court's order. And under *Hunt versus City*
3 of Minneapolis in our brief, the case should be retained. A
4 PFS was submitted. There is absolutely zero prejudice to
5 the defendants on this. We move for leave for the
6 late-filed suggestion of death.

7 MR. HULSE: Your Honor.

8 THE COURT: Part of the purpose of issuing PTO 23
9 was to make sure that plaintiff kept in sufficient contact
10 with counsel, that we had a reasonably accurate sense of who
11 was alive and who was dead and what cases we had.

12 If I remember correctly, there was a request by
13 the defendants that the suggestion of death happen within
14 30 days. Plaintiffs said that's not really enough. It made
15 sense to me, so we made it 90, but that was all the result
16 of hearing and compromising. That's how we came up with the
17 90, was because it is not sufficient to sit back and wait to
18 find out whether people have died, but that it does require
19 keeping in contact with the plaintiffs to find out whether
20 they are alive or dead.

21 So how does just not like -- not being in
22 sufficient contact with the Bellandes to know that there had
23 been a death comply with the whole thing that we went
24 through when we came up with PTO 23, which is you can't just
25 sit back and do it? So, you know, had there been regular

1 contact you would have known, but there wasn't, so that's
2 how the -- that's how the date gets missed. So is that --

3 MR. HODGES: Your Honor, even in my single-event
4 cases I don't contact my clients every 60 or 90 days and ask
5 are you still alive. It sounds like, I think, an easier
6 task than it is. These are people that are elderly. As the
7 court is well aware, this is an older client population.
8 They get sick. They go to doctor's appointments. They go
9 into the hospital. Some of them go to nursing homes. Some
10 of them go and stay with relatives for extended periods of
11 time. So there's gaps in communication that just happen
12 normally. It doesn't mean the client is dead. And we're
13 kind of at a disadvantage there that when it does happen,
14 that the client is gone, they may not have informed the
15 relatives that, hey, I have this lawsuit pending. We are in
16 contact with them enough. Obviously, we found out within
17 several months, but -- or what was it? Four months or less
18 than four months we found out.

19 THE COURT: The problem is that's really a motion
20 to amend PTO 23. That's exactly the reason we said 90, is
21 because there are a lot of people, they are elderly. That's
22 how we arrived at 90. That's why I didn't give the
23 defendants the 30 they were asking for. But the order was
24 made with consideration to all the factors. And the factors
25 that you are listing are -- they are true, they are

1 accurate, they are legitimate. And the compromise that was
2 made was to have the 90-day filing. And so if the 90 days
3 comes and goes and we say, well, never mind, then we are
4 saying PTO 23 is --

5 MR. HULSE: Advisory.

6 THE COURT: That's not the word I was looking for.
7 I was looking for like abrogated without briefing.

8 MR. HODGES: Your Honor, perhaps it sounded
9 reasonable at the time. This has happened in a very
10 minority of situations, as the court is well aware of, and I
11 think each of them tends to be somewhat unique, but I would
12 ask that these plaintiffs be given their due process and
13 allowed for a technical violation. Again, there is
14 absolutely zero prejudice to the defendants in this case.
15 And perhaps PTO 23 seemed workable on the front end of
16 things, but I am telling you right now representing real
17 people here today it doesn't work for them and there was no
18 way we could have -- we could have done this or cured this.
19 There's no conscious disregard here. There's no willful
20 disobedience of PTO 23. The relatives didn't even know
21 about PTO 23.

22 THE COURT: PTO 23, there's been no motion to
23 amend it. There's no information before the court
24 explaining why contact couldn't be maintained. It does --
25 would require contact every 90 days.

1 I will hold off on ruling on the Bellandes pending
2 further submissions from counsel as to why PTO 23's 90-day
3 keeping in touch was not able to be complied with in that
4 case. And I don't have a motion to amend PTO 23, and I'm
5 not going to just amend it on the fly because of arguments
6 that were made at the time. That is my ruling with respect
7 to the Bellandes.

8 MR. HODGES: Your Honor, may I be heard on one
9 issue? We did originally ask for six months as opposed
10 to --

11 THE COURT: I have just ruled on the Bellande
12 issue.

13 MR. HODGES: Very well.

14 THE COURT: And we will put a date of one week for
15 further submissions explaining why in this particular case
16 it was not possible to comply with the Pretrial Order
17 No. 23.

18 MR. HULSE: Your Honor, I think we have covered
19 this, except maybe we should just mention that *Nickell* was
20 dismissed by stipulation. That was the one we hadn't -- I
21 don't think we touched on.

22 THE COURT: And the case number on that one?

23 MR. HULSE: That was Case No. 17-0428 -- I am
24 sorry -- 04285.

25 THE COURT: N-i --

1 MR. HULSE: -- c-k-e-l-l.

2 THE COURT: Okay. Anything else, Mr. Hulse or
3 Mr. Blackwell?

4 MR. BLACKWELL: Again, just briefly, Your Honor,
5 relating again to Item No. 1 in our joint agenda. At the
6 end of the first paragraph on page 2 it indicates the
7 parties are meeting and conferring on the schedule to cover
8 the next phase of discovery in the six other bellwether
9 cases, not *Axline* set for December, but the six other ones.

10 THE COURT: I see that.

11 MR. BLACKWELL: And that's the -- it's very
12 scintillating too, Your Honor.

13 THE COURT: Pardon me? I came back from the
14 Eighth Circuit conference to be here. I am physically here.

15 MR. BLACKWELL: I'm sure it was scintillating too,
16 Your Honor.

17 THE COURT: You must have been there.

18 MR. BLACKWELL: I was actually at a meditation
19 week last week in Los Angeles, but Your Honor --

20 THE COURT: Yeah, me too.

21 MR. BLACKWELL: All right. I'm going to move on,
22 Your Honor.

23 It would be helpful I think to the parties as we
24 work on a schedule to propose to Your Honors for the next
25 phase of discovery in those six cases if Your Honor has in

1 mind when there might be the next trial date after the
2 December setting for Axline, so we can work backwards from a
3 trial date in proposing the schedule. So whether Your Honor
4 is prepared to say that today or not, we don't know, but at
5 least I want to ask the question, if there is --

6 THE COURT: That's a good point. It's a good
7 point.

8 MR. BLACKWELL: Thank you, Your Honor. Is that
9 your honest final word?

10 THE COURT: Yes, it is.

11 MR. BLACKWELL: Thank you, Your Honor.

12 THE COURT: You need Cathy's involvement for that.

13 MR. BLACKWELL: All right. We will work on still
14 on some proposal with respect to that next phase, you know,
15 for the court. We have certain discovery kinds of issues
16 and questions that are coming up even now that --

17 THE COURT: Right. Yes. I'm not saying I -- just
18 I can't -- I'm not the keeper of the calendar, but I'm not
19 saying don't talk to Cathy.

20 MR. BLACKWELL: Don't talk to Cathy. So we will
21 reach out to Cathy and inquire for all of us.

22 THE COURT: Yes, good one.

23 MR. BLACKWELL: All right. Thank you, Your Honor.

24 THE COURT: Well understood.

25 MR. BLACKWELL: All right. That's it.

THE COURT: Okay. Thank you, Mr. Blackwell.

2 Ms. Zimmerman, anything else on the -- I think we
3 have covered what was on the sheet.

4 MS. ZIMMERMAN: I think that's correct, Your
5 Honor.

6 THE COURT: Okay. Well, thanks, everybody.

7 Oh, they have got -- your client was going to --
8 you are on the criminal matter, right?

9 MR. MOHS: I am, Your Honor.

10 THE COURT: Yes. Okay. So the marshals tried to
11 bring him up a minute -- more than 15 minutes ago and I said
12 15 minutes. So I don't know if you have been in contact,
13 but, anyway, we are going to be done here. And then if you
14 can -- I know Mr. Docherty came and went, so I am ready to
15 move on to your matter.

16 MR. MOHS: Great.

17 THE COURT: All right. And on the Bair Hugger
18 case, we are in recess. Thanks, everybody.

19 | THE CLERK: All rise.

20 | (Court adjourned at 11:25 a.m., 08-16-2018.)

21 | * * *

22 I, Renee A. Rogge, certify that the foregoing is a
23 correct transcript from the record of proceedings in the
24 above-entitled matter.

25 Certified by: /s/Renee A. Rogge
Renee A. Rogge, RMR-CRR